

MORRISON & FOERSTER LLP

SAN FRANCISCO
LOS ANGELES
DENVER
PALO ALTO
WALNUT CREEK
SACRAMENTO
CENTURY CITY
ORANGE COUNTY
SAN DIEGO

ATTORNEYS AT LAW
2000 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20006-1888
TELEPHONE (202) 887-1500
TELEFACSIMILE (202) 887-0763

NEW YORK
WASHINGTON, D.C.
NORTHERN VIRGINIA
LONDON
BRUSSELS
HONG KONG
BEIJING
SHANGHAI
SINGAPORE
TOKYO

July 1, 2004

Writer's Direct Contact
202-887-6935
mtobey@mofo.com

By Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **EX PARTE COMMENTS OF GENERAL ELECTRIC CAPITAL CORPORATION**
Notice of Proposed Rulemaking
Facilitating the Provision of Spectrum-Based Services to Rural Areas and
Promoting Opportunities for Rural Telephone Companies to Provide
Spectrum-Based Services
WT Docket Nos. 02-381, 01-14 and 03-202

Dear Ms. Dortch:

On behalf of General Electric Capital Corporation ("GE Capital" or the "Company"), we hereby submit this letter in response to the above-referenced Notice of Proposed Rulemaking ("NPRM").¹ Specifically, GE Capital wishes to address for the record in this proceeding an important issue raised by the NPRM concerning the policy of the Federal Communications Commission ("FCC" or "Commission") prohibiting a lender from taking a security interest in an FCC license. In the NPRM, the Commission asked whether it should modify that policy and permit the U.S. Department of Agriculture's RUS Telecommunications Program ("RUS") to obtain security interests in the spectrum licenses of its borrowers. For the reasons set forth herein, GE Capital urges the Commission to modify its current policy, not just for the benefit of FCC licensees financed by RUS, but for all licensees, by expressly permitting such lenders to take security interests in the spectrum licenses of their borrowers. Such a policy change

¹ See Notice of Proposed Rulemaking, Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services WT Docket Nos. 02-381, 01-14 and 03-202, 18 FCC Rcd 20802 (2003) ("NPRM").

would encourage the flow of capital to communications enterprises, thereby facilitating the development and expansion of our nation's communications infrastructure and services. GE Capital also urges the Commission to modify the prior approval requirements and procedures applicable to secured lenders when faced with defaulting licensee borrowers who have secured their loans with stock pledges and security interests in sale proceeds and, if permitted, spectrum licenses.

I. GE CAPITAL'S INTEREST IN THIS PROCEEDING

GE Capital is a diversified financial services company which, among other activities, provides financing to companies operating in the telecommunications, broadcasting, and cable television fields. GE Capital's interest in the issues raised by the NPRM is long-standing. In 1991, the Company filed comments in response to the Petition for Declaratory Ruling filed by Hogan & Hartson, which requested the Commission to rule that lenders may take a limited security interest in FCC licenses.² In 1992, GE Capital reiterated its views in reply comments filed in response to the Commission's Notice of Proposed Rulemaking in MM Docket 92-51, the Mass Media Bureau's "capital formation" docket.³ Although both of these proceedings resulted in extensive records in which many parties advocated a change in the Commission's policies to permit lenders to take security interests in FCC licenses, the FCC has left this issue open.

GE Capital commends the Commission for once again seeking comment on these important issues in this docket. The timing for a modification of the Commission's security interest policy could not be more opportune – after several years of stagnate growth and poor economic performance, the telecommunications market appears poised to make a recovery. Now is the time for equipment manufacturers and service providers to invest in infrastructure upgrades and expansion, technological improvements and innovations, and research and development to ensure that the citizens of the United States receive the highest quality communications products and services.

² See Comments of General Electric Capital Corporation filed April 22, 1991, in response to Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License (Feb. 21, 1991) (MMB File No. 910221A) ("Declaratory Ruling Comments").

³ See Reply Comments of General Electric Capital Corporation, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51 (July 13, 1992) ("Capital Formation Comments").

II. PERMITTING LENDERS TO TAKE A SECURITY INTEREST IN SPECTRUM LICENSES WILL INCREASE THE FLOW OF CAPITAL TO FCC LICENSEES

The Commission asks in the NPRM whether the ability to take a security interest directly in spectrum licenses would, in fact, create new financing opportunities.⁴ GE Capital believes the answer to that question is an unequivocal yes.⁵ As the Commission noted in the NPRM, the agency's policies with respect to secured transactions involving its licensees have evolved over time.⁶ Many of these changes have been beneficial for licensees by facilitating improved access to capital, including policies that now expressly permit a lender to take a security interest in the proceeds of the sale of a spectrum license.⁷ When combined with pledges of the licensee's stock and security interests in the licensee's physical assets and revenues derived from its operations, licensee borrowers can offer lenders security interests that approach, but do not equal, the security interests granted to lenders by non-licensees, who can grant a security interest in all of their critical assets, which enhances their ability to obtain financing. Communications licensees, in contrast, are not able to offer lenders a security interest in the very collateral that has the most value in the enterprise – the FCC license.

Although a security interest in the proceeds of the sale of an FCC license is helpful, lenders should be more willing to finance FCC licensees if the licensee can grant a security interest directly in the license. With a security interest only in the proceeds, rather than the license itself, the lender must wait for the licensee to negotiate and complete a sale of the license to a third party. While waiting for a sale, the value of the business may be plummeting, further jeopardizing the lender's ability to recover its investment in the defaulting debtor. A security interest in the FCC license would give the lender a greater role in effecting a quicker sale of the license with less chance of disruption in the provision of communications services. Similarly, a pledge of the stock of the FCC licensee is helpful, but it is not an adequate substitute for a security interest in the license.

⁴ NPRM, ¶ 82.

⁵ Although the Commission's question was limited to new financing opportunities to facilitate the construction, deployment, and continuity of new and existing wireless services in rural and underserved areas, *id.*, GE Capital believes the broader policy change recommended herein would have concomitantly broader benefits throughout the communications industry.

⁶ *Id.*, ¶ 79.

⁷ *Id.*, ¶ 83.

A change in the FCC's policies with respect to *all* spectrum licenses – not just spectrum used for rural wireless services – and for the benefit of *all* lenders – not solely RUS – would remove these financing impediments and enhance the flow of capital to communications service providers, enabling them to build and improve the delivery of communications services.

III. A CHANGE IN THE FCC'S SECURITY INTEREST POLICY MUST BE ACCOMPANIED BY A CHANGE IN THE COMMISSION'S PRIOR APPROVAL PROCEDURES

As GE Capital explained in its Declaratory Ruling Comments and its Capital Formation Comments, a change in the FCC's security interest policy, standing alone, is not sufficient to put lenders to the communications industry on an even footing with lenders to other business enterprises. A foreclosure sale by a lender to an FCC licensee is subject to the requirement in Section 310(d) of the Communications Act of 1934, as amended, to obtain FCC approval prior to an assignment of an FCC license or the transfer of control of an FCC licensee.

GE Capital recognizes that the Commission historically has disallowed security interests in FCC licensees partly out of concern that such financing arrangements may interfere with its statutory obligation to regulate the assignment of licenses and the transfer of control of licensees.⁸ It is not necessary to dispense with the statutory prior approval requirement. But the Commission should modify those procedures to address foreclosure sales.

As GE Capital described in its Declaratory Ruling Comments and its Capital Formation Comments, the current procedures for obtaining prior FCC approval jeopardize the ability of secured lenders to realize on their secured collateral when their borrowers are in default. Transfers of control and assignments of licenses are generally subject to the Commission's 30-day public notice and petition to deny procedures. Further, in the absence of a court-appointed receiver or trustee, the FCC's procedures require the licensee's participation in the preparation, filing, and prosecution of a transfer or assignment application. The debtor can use these requirements to further delay a sale.

This use – or misuse – of the Commission's procedures is contrary to the Commission's well-established policy of maintaining neutrality in dealings between FCC licensees and parties with whom such licensees have private commercial disputes

⁸ *Id.*, ¶ 86.

or disputes governed by other statutory schemes.⁹ To remedy this situation, GE Capital repeats the recommendation made in its Capital Formation Comments that the Commission adopt procedures allowing for the expedited approval of the transfer of a licensee or assignment of a pledged license to an independent trustee pursuant to the terms of the security agreement between the lender and the licensee.¹⁰ Such procedures would be analogous to the Commission's expedited procedures for the appointment of an independent trustee to accept the tender of shares in a hostile tender offer.¹¹ Under the proposed procedures, in situations where the security documents provided for the transfer of a defaulting licensee's assets to a trustee, a lender, either in cooperation with the debtor or independently if the debtor refused to cooperate, would be permitted to submit a "short form" application for the FCC's consent to the *temporary* transfer of control of the licensee or assignment of the license to a trustee meeting all of the qualifications for independence mandated by the FCC. Compliance with the full "long-form" application requirements would be required for any subsequent assignment of the license or transfer of the licensee to a new purchaser. The authority of the trustee would be limited to that of a temporary conservator or caretaker charged with preserving the assets in order to facilitate an orderly sale.

Throughout the process described above, the lender's rights vis-à-vis the defaulting licensee ultimately would be determined through the processes applicable to normal creditor-debtor relationships (including whether the licensee actually is in default). The advantage of this approach is that it neutralizes the potentially detrimental effect of the FCC's current procedures by allowing lenders to utilize the customary statutory and contractual remedies and by rendering loans to FCC licensees less cumbersome. At the same time, however, the FCC would not be placed in the position of itself having to adjudicate the propriety of the creditor's exercise of its rights. Instead, the Commission would neither hinder nor encourage a particular outcome, but rather would assist in the effectuation of an outcome determined through judicial or other processes.

IV. CONCLUSION

For the reasons set forth above, GE Capital urges the Commission to modify its security interest policy to permit lenders, including but not limited to RUS, to take a

⁹ See Tender Offers and Proxy Contests, Policy Statement, 59 R.R.2d 1536 (1986) ("Tender Offer Policy Statement").

¹⁰ Thus, the authority of such a trustee would arise from the contractual relationship between the creditor and the debtor, rather than through judicial appointment in a bankruptcy or state foreclosure or receivership proceeding.

¹¹ See Tender Offer Policy Statement, ¶¶ 34-71.

Ms. Marlene H. Dortch
July 1, 2004
Page 6 of 6

direct security interest in spectrum licenses. GE Capital further recommends that the Commission adopt a two-step prior approval process for assignments and transfers involving defaulting debtors that would permit the use of short-form procedures to transfer or assign the license to a trustee – if provided for in the governing loan documents – who would conserve the debtor's assets while arranging for a third-party sale pursuant to the long-form procedures. Such a two-step procedure would ensure the Commission's neutrality in non-consensual workouts of loans in default.

GE Capital recognizes that these proposals, although previously advanced by GE Capital in direct response to Commission solicitations in two open dockets, may be beyond the scope of the current rulemaking. Given the pressing importance of facilitating the flow of new capital to FCC-licensed enterprises, however, GE Capital believes the Commission should promptly initiate a separate rulemaking proceeding to address these and related issues to the extent they are determined to be beyond the scope of the present proceeding.

Respectfully submitted,

/s/

Margaret L. Tobey

cc: Nicole McGinnis (FCC) (By E-Mail)